



# Protecting Safety Information in the Military

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# OVERVIEW

- Genesis of Safety Investigations
- DOD safety infrastructure
- Legal Protections
  - Executive and “Machin” Safety Privilege
  - Witness Confidentiality
- Regulations and Agency Behavior
- Withholding & Releasing Information
  - Privileged v. Non-privileged
  - FOIA Exemption B(5)
  - Litigation (civil and military)
  - Waiver
- Current Initiatives

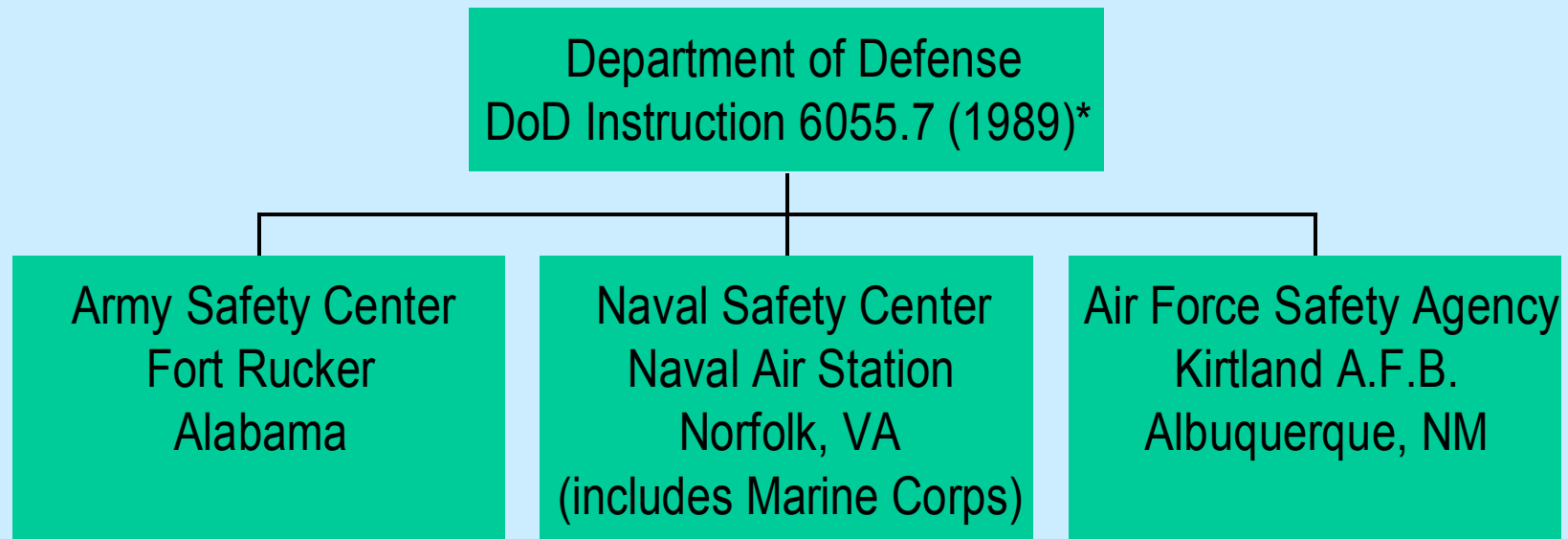


# GENESIS

- 1908 Wright Flyer
- 1950's Mishap Rates  
About 300 aircraft/year DOD wide
- Formalized Safety Investigation Procedures



# DOD SAFETY CENTERS



\* Revised, pending release Fall 1998



# LEGAL PROTECTION

- Constitution: Executive Privilege  
Agency designee “asserts” privilege
- Case Law
  - U.S. v. Reynolds (1952); Test aircraft with crypto gear  
No release; the Report was privileged
  - Machin v. Zuckert (1963, cert den’d); B-52 crash  
No release; the report was privileged
    - Privilege extends to conclusions of the investigation Board and any information derived from a Promise of Confidentiality
- Promise of Confidentiality
  - Investigation Board members, technical experts, Witnesses



# REGULATIONS AND AGENCY BEHAVIOR

- One parent DOD Instruction with separate, tailored Regulations for each Service
- Limited Distribution of privileged information
  - Dealings with Contractor reps
  - Intra-DOD and intra-service routing
- Certain uniform procedures
  - Promise of Confidentiality
  - Database architectures have restricted and non-privileged fields
  - Releasing information



# RELEASING AND WITHHOLDING INFORMATION

- Release Non-privileged
  - Facts, engineering reports, CVR transcripts, ATC tapes
- Withhold Privileged
  - Deliberations, opinions, recommendations, witness testimony
- Common issues
  - Freedom of Information Act/Congress
  - Litigation
  - Waiver of Privilege



# RELEASING AND WITHHOLDING INFORMATION (cont'd)

- Freedom of Information Act
  - Exemption B(5) protects deliberative work product
  - Investigation Board opinions and recommendations are deliberative
  - Congress treated as a FOIA requestor
- Litigation
  - Civil Courts usually honor Safety Privilege in Discovery contests
  - Military Courts usually require an *in camera* hearing
- Waiver
  - Service Secretaries may waive privilege in limited cases





# CURRENT INITIATIVES

- Strengthen Safety Privilege
  - Promise of Confidentiality only if needed
  - Stricter controls on Waiving Privilege
  - Restricted distribution
- Joint Service Safety Chiefs conferences
- Increased inter-Safety Center coordination
- Joint Information Management Team
  - Chartered by the Safety Chiefs
  - Feasibility of intra-DOD database sharing